Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1976

No. 76-1577

JAMES WENDELL HALL,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

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STATE OF IOWA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that a writ of certiorari be denied to review the judgment of the Supreme Court of the State of Iowa entered on February 10, 1977.

CITATIONS TO OPINIONS BELOW

(1) Johnson County District Court decision July 2, 1974 denying new trial and arrest of judgment (Unreported —Reproduced in Petitioner's Appendix, Page 1a).

(2) *State v. Hall,* 235 N. W. 2d 702 (Iowa 1975) (Petition for rehearing denied April 12, 1976—Reproduced in Petitioner's Appendix, Page 174a).

(3) Johnson County District Court hearings of January 9, 1976, January 30, 1976 and February 13, 1976, resulting in decision February 27, 1976 (Unreported— Decision printed in Petitioner's Appendix A, Page 159a. Hearings reproduced in part in Respondent's Appendix, Page 1a).

(4) *State v. Hall,* 249 N. W. 2d 843 (Iowa 1977) (Petition for rehearing denied February 10, 1977—Reproduced in Petitioner's Appendix A, Page 202a).

—o—

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

—o—

QUESTIONS PRESENTED

1. Does the alleged prosecutorial misconduct before the grand jury indicting Petitioner deny Petitioner Fourteenth Amendment and Sixth Amendment Constitutional

rights and, if so, does Petitioner show cause on these grounds for granting his Petition for Writ of Certiorari?

2. Did the Respondent fail to produce and the trial court fail to order production of an alleged fingerprint on a matchbook cover and, if so, does Petitioner thereby present cause on these gorunds for granting his Petition for Writ of Certiorari?

3. Did the trial court err in overuling Petitioner's motion for a directed verdict and, if so, does Petitioner show cause on this issue for granting his Petition for Writ of Certiorari?

4. Did the trial court err in denying the Petitioner's Motion to Suppress the Testimony of Rosemary Jones and John Reding and, if so, does Petitioner show cause on these grounds for granting his Petition for Writ of Certiorari?

5. Did Respondent's prosecutor in violation of Petitioner's Constitutional Fifth Amendment rights improperly comment in closing argument on Petitioner's failure to testify responding to argument inviting comment by Petitioner's attorney and, if so, does Petitioner show cause on this issue for granting his Petition for Writ of Certiorari?

6. Did the trial court err regarding certain trial jurors' alleged misconduct and, if so, does Petitioner show cause on these grounds for granting his petition for Writ of Certiorari?

7. Was there sufficient cumulative error to have warranted a new trial; and, if so, does Petitioner show cause on this issue for granting his Petition for Writ of Certiorari?

STATEMENT OF THE CASE

Jurisdiction is claimed under 28 U. S. C. § 1257(3) from failure to grant Petitioner a new trial on final judgment of the Supreme Court of Iowa on January 19, 1977. On February 10, 1977 petition for rehearing thereon was denied by the Iowa Supreme Court.

No issue in the Petition for Writ of Certiorari filed by Petitioner was raised or considered by the Iowa Supreme Court in the January 19, 1977 case. *State v. Hall,* 249 N. W. 2d 843 (Iowa 1977). All issues were raised and considered adversely to Petitioner in *State v. Hall,* 235 N. W. 2d 702 (Iowa 1975) in which conviction was unanimously affirmed, conditionally; being remanded to allow grand jury transcript pages not before the Iowa Supreme Court to be examined for exculpatory evidence. The January 19, 1977 Iowa Supreme Court case confirms without dissent that no exculpatory evidence was found.

The following facts were introduced at Petitioner's trial.

On March 13, 1973, Sarah Ottens, a 19 year old freshman nursing student was found murdered in a fourth floor dormitory room she occupied in Rienow Hall, University of Iowa Campus, Iowa City, Johnson County, Iowa.

Petitioner, James Wendell Hall, who occupied a student room in another dormitory across the street, with drapes parted, could see from his room into Miss Ottens' room.

It was during the "spring break" and almost everybody who did not go back home went somewhere else. Em-

ployment at a hospital had detained Miss Ottens from going home. On the preceding night she had been the sole occupant of Rienow Hall's fourth floor. The afternoon of March 13 another young lady returned to her Rienow Hall fourth floor room. During "spring break" Rienow Hall outside doors were locked at night, but students staying on campus were given an entrance key and anyone could exit by push bar.

Near midnight the female student who had returned that afternoon discovered Miss Ottens' body on her way to a rest room across the hall from Miss Ottens' room. She immediately summoned her boyfriend from her room and thereafter authorities were quickly notified.

The victim was wearing only a blouse. Her jeans and panties were found rolled together on the floor beside her. The cause of death was asphyxiation caused by strangulation. Death occurred, in the pathologist's opinion, between 3:00 P. M. and 9:00 P. M. However, recognizing uncertainties, he first placed the time of death between 12:00 noon and 11:00 P. M.

Testimony placed Petitioner, on the date of the murder, knocking on Miss Ottens' door at about 3:30 P. M. and on Rienow Hall steps between the fourth and fifth floors at about 10:30 P. M.

A pathologist with reference to bruises, skin texture, measurements and other factors testified that a broom found at the crime scene was the burder weapon, being first used to pin Miss Ottens at the shoulders and then slipped to her throat to strangle her. After death an object like the broom handle had been rammed up the anus

of the victim. The broom contained fecal material on the handle.

Also, after death, an indentation on the top of the victim's head was made which was about two inches by one-fourth inch in size. The object causing it, according to the pathologist, would have to be rounded, semi-rigid, and employed with great force. One of Petitioner's gym shoes seized by search warrant from a closet in his room was found to have one long and one short intertwined hairs wedged under the laces at the toe. The shoe had a heavy rubber sole and the toe was rounded and semi-rigid. A strand of one of the hairs taken from the shoe was found to be consistent with the victim's hair.

A hair from Petitioner's head was compared with the only human hair (not the victim's) found on the victim's blouse and found to be consistent. An expert testified that if 50 persons in the courtroom gave a hair sample she would expect only two or three to be consistent.

The victim when found had damp hair and her face appeared to have been partially washed or drenched in water. She had bled from the nostrils. A wash basin in the room was filled with water, the stopper having been inserted in the drain. The wash basin appeared to have blood colored water in it . A damp bloody colored spot was on the floor by the sink containing the pattern of a head of hair. The body was stretched out a short distance from the sink.

The right (cold water) faucet handle had a latent thumb print on it. The position of the print indicated a left thumb had pressed against the handle palm down, thumb pointing to the right of the person facing the sink,

a position allowing a person to hold a body up with the right arm. This thumb print was compared with the left thumb print of the Petitioner and the State's fingerprint expert testified that in this opinion the thumbprint on the faucet handle was Petitioner's.

A Johnson County, Iowa, grand jury indicted Petitioner on September 19, 1973.

On May 23, 1974, after several pre-trial hearings, upon the foregoing evidence and other circumstantial evidence Petitioner was convicted of murder in the second degree by verdict of a Johnson County petit jury. Upon denial of a motion for new trial Petitioner was sentenced to 50 years imprisonment.

REASONS FOR DENYING THE WRIT

I.

Alleged Prosecutor Misconduct Before Grand Jury

Petitioner alleges that the prosecutor injected racially prejudicial matters into the proceedings before the grand jury. The Iowa Supreme Court found no misconduct of the prosecutor relating to race. Petitioner relies upon the fact the prosecutor said to the grand jury: "also, he is known to beat up Leslie Hall, a white girl friend. Incidentally this Jim Hall won't go with a black girl. He will only go with white girls, which is interesting; maybe something's wrong with him. Maybe he hates them down deep, you see, but he has beat up this Leslie Hall." Petitioner

asserts this remark was to inflame the jury and that he may have had some hatred of white girls was an amateur psychological guess. It is more likely prosecutors were acting in consultation with a clinical psychologist at the time. Unfortunately, a search of the record establishes neither position. The grand jury transcript does not contain all the proceedings of the grand jury. (Respondent's Appendix pp. 19-20 from transcript of remand hearing pages 41-43.)

At this time it is common knowledge (see, e. g., *New York Times,* Monday, April 18, 1977; *Des Moines Register,* May 30, 1977; *Des Moines Register,* June 6, 1977) that police are looking for a suspect with the tag name "Son of Sam" who may be the person in the Bronx and in Queens murdering *females with shoulder length brown hair.*

The grand jury in search of motive could not disregard the possibility of a male person of one race having a mental condition that resulted in a compulsion to commit violence upon a female person of another race. The grand jury transcript also shows the grand jury investigated Petitioner for a possible "discovery in the act of committing a burglary" motive. The reported case, *State v. Hall,* 235 N. W. 2d 702 (Iowa 1975), discloses that both of these motives were not introduced at the trial.

For cross-examination purposes, grand jury testimony of witnesses who testified at the trial were turned over to Petitioner. When transcript pages of grand jury testimony were turned over they contained out of context remarks relating to testimony not introduced at the trial. The pages of testimony relating to the discarded motives and other non-testimonial matters constituted the missing

pages which did not get to the Iowa Supreme Court for the first appeal.

In the first appeal to the Iowa Supreme Court the court at pages 712 and 713 of the opinion is critical of the prosecutor for attempting to "improperly influence or sway the deliberations" of the grand jury by his statements and for introducing "a mass of evidence which had no proper place in the grand jury's investigation." The grand jury was thus viewed as being somewhat controlled by the prosecutor.

The Iowa Supreme Court at the time of the second appeal, *State v. Hall,* 249 N. W. 2d 843 (Iowa 1977) had the missing pages and concluded at page 849 that it was a "loosely-controlled and meandering grand jury investigation." Also at the remand hearings it was revealed that the grand jury was "very uninhibited" and decided what they wanted investigated and did "investigating on their own." (Respondent's Appendix, pp. 21-23 from transcript of remand hearings pp. 82 and 84). Clearly, this is within the grand jury's authority. *United States v. Calandra,* 414 U. S. 338, 344-345, 349 (1974); *State v. Hall,* 235 N. W. 2d 702, 712 (Iowa 1975). Federal cases, which were not brought to the Iowa Supreme Court's attention, extend such authority to the prosecutor. *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F. Supp. 1098, 1119 (E. D. Pa. 1976); *United States v. Kleen Laundry & Cleaners, Inc.,* 381 F. Supp. 519, 521-522 (E. D. N. Y. 1974).

Most importantly the remand proceedings bring out what appeared to be unsupported statements by the prosecutor to sway the grand jury as being summation of testimony and other evidence heard by the grand jury (Peti-

tioner's Appendix B, pp. 203a-206a). In any event Petitioner has failed to show how alleged prosecutorial misconduct has prejudiced him. The petit jury did not know of the matters complained of before the grand jury and their verdict of guilty was untainted. *United States v. Calandra*, 414 U. S. 338 (1974); *Silverthorne v. United States*, 400 F. 2d 627, 634 (9th Cir. 1968), rehearing 430 F. 2d 675, cert. denied, 400 U. S. 1072.

II.

Examination of Smudged Fingerprint.

The claim that the Petitioner did not get to examine the smudged fingerprint on the matchbook cover is a misrepresentation of fact. The remand proceedings shows that Petitioner's attorney went to the Iowa B. C. I. laboratory and examined all the physical evidence (Respondent's Appendix, pp. 21-23 from the remand hearings pp. 82-84).

Denial of discovery rule rights must result in a showing of prejudice to Petitioner. *Mullins v. U. S.*, 484 F. 2d 581, 589 (8th Cir. 1973).

No violation of a federal right is specified on this question by the Petition for Writ of Certiorari.

III.

Refusal to Direct Verdict.

Petitioner complains that the lower court should have directed a verdict of acquittal. However, at this time the findings of the jury should not be disturbed. *7th Amendment to the United States Constitution; United States v.*

Frazier, 545 F. 2d 71, 74 (8th Cir. 1976); *State v. Harvey*, 242 N. W. 2d 330, 341 (Iowa 1976). The Iowa Supreme Court's decision upholding the jury verdict should not be reviewed unless wholly unsubstantiated which in this case it is not. *Lamb Enterprises, Inc. v. Kiroff*, 399 F. Supp. 409, 415 (1975).

Again, no violation of a constitutional right is specified by Petitioner pertaining to this issue.

IV.

Rebuttal Testimony.

Petitioner claims the rebuttal testimony of John Reding should not have been admitted. The Iowa Supreme Court (which did not have the opportunity as the jury did to see Mr. Reding and the artist's sketch of the man in the elevator) concluded it must be two different instances involved.

In any event, Petitioner does not allege how or in what manner he was prejudiced by this testimony. Prejudice cannot be presumed; it must be shown. *State v. Franklin*, 242 Iowa 726, 46 N. W. 2d 710 (1951). The testimony of Reding did not incriminate Petitioner according to the findings of the Iowa Supreme Court.

Petitioner claims the testimony of Rosemary Jones should not have been admitted when she was recalled for further cross-examination. She had admitted she lied when she testified previously.

Recall of a witness is within the court's discretion. *State v. Droste*, 232 N. W. 2d 483 (Iowa 1975).

It would have been an abuse of discretion not to allow Rosemary Jones to be recalled to testify on further cross-examination under such circumstances. *Hollins v. State,* 210 S. E. 2d 354 (Ga. 1974).

Recalling Rosemary Jones for cross-examination was the proper way for her to come back as a witness. *Spiro v. State,* 41 Wis. 2d 390, 164 N. W. 2d 230, 233 (1969).

No violation of a federal right is specified in the Petition for Writ of Certiorari as being violated regarding the testimony of Reding and Jones.

V.

Alleged Prosecutorial Misconduct—Final Argument

Petitioner claims his Fifth Amendment constitutional rights were violated by the prosecutor commenting in response to the argument of Petitioner's attorney as to the reason Petitioner did not testify at the trial.

In substance the Petitioner's attorney argued to the jury that Petitioner did not testify as the State's proof presented at the trial was not of sufficient probative value to be worth a response and the prosecutor responded by telling the jurors they were not bound to believe this explanation and could believe as they liked. Petitioner's attorney did not object to this response at the trial.

Under the doctrine of invited error the prosecutor could have responded with his own reasons why he believed the defendant did not testify, but in the words of the Iowa Supreme Court he made a singular reference in a "restrained and temperate manner" to Petitioner's improper arguments.

The doctrine of invited error has been invoked on many occasions. *United States v. Fulton,* 549 F. 2d 1325, 1328 (9th Cir. 1977); *United States v. Warren,* 550 F. 2d 219, 227 (5th Cir. 1977); *State v. Brewer,* 247 N. W. 2d 205, 215 (Iowa 1976).

Also, some violations of the Constitution are so insignificant or unimportant in relation to the circumstances of a case as to be "harmless and therefore not requiring automatic reversal." *Chapman v. California,* 386 U. S. 18, rehearing denied 386 U. S. 987 (1967).

VI.

Alleged Misconduct of Certain Jurors.

Petitioner complains about certain jurors, but does not specify what federal right has been violated in respect to his complaints.

Juror Goodlove was accused during voir dire of the jury of saying, "I don't know why they just don't hang him and get it over with." There is no capital punishment in Iowa and if a juror is jesting during voir dire he is usually thinking about hanging the lawyers. In any event the judge did not believe the person who said he said it and he believed Goodlove when he said he did not recall making such a remark an that he would not have made a comment of this kind (Petitioner's Appendix, page 244a). The issue then turned upon the credibility of witnesses and it is for the finder of fact, not an appellate court, to determine the credibility of witnesses. *State v. Jellema,* 206 N. W. 2d 679, 681 (Iowa 1973).

Juror Housel became aware that he had knowledge that might influence him against the defendant and asked to see the judge. He was excused and an alternate juror replaced him.

The complaint of Petitioner is that the deliberations of the jury were affected by the withdrawal of juror Housel.

Housel denied ever discussing the matter with other jurors. There is no presumption of prejudice; it must be shown. *State v. Franklin,* 242 Iowa 726, 737, 46 N. W. 2d 710, 716 (1951).

Petitioner complains that some jurors had a single highball before a meal during jury deliberations.

To justify a new trial for jury misconduct it must appear that the misconduct was calculated to and probably did influence the verdict. *State v. Houston,* 209 N. W. 2d 42, 45 (Iowa 1973).

When jurors have consumed alcohol, the modern rule is that it will not vitiate the verdict unless it influences proper performance of duties. It is a question of fact for the trial court's determination. *State v. Phillips,* 212 Iowa 1332, 236 N. W. 104, 106 (1931); *Kealoha v. Tanaka,* 45 Hawaii 457, 370 P. 2d 468 (1962).

Petitioner's final complaint regarding the jury is based upon an affidavit by a person named Hinman given more than a year after the conclusion of the trial. The affidavit is not a part of the record of this case, being neither testimony nor a professional statement, and should not be considered.

VII.

Cumulative Effect.

Petitioner alleges that the cumulative effect of the six previously discussed issues mandate a reversal of the case.

Although the cumulative effect concept is applicable in some situations, it cannot be recognized in the case now before this Court. The reason is that Petitioner's assignments of error are without merit and therefore it necessarily follows that the cumulative effect argument is similarly without merit. *Wade v. State,* Okl. Cr., 556 P. 2d 275, 280 (1976). There must be the presence of error to apply the cumulative effect doctrine.

Courts recognize that the doctrine of cumulative error "is to be sparingly and strictly applied." *State v. Hamilton,* 89 N. M. 746, 557 P. 2d 1095, 1100 (1976). In *State v. Carey,* 165 N. W. 2d 27 (Iowa 1969), cited in Petitioner's Writ of Certiorari (page 27), the Supreme Court of Iowa stated that this doctrine "is not to be invoked lightly. It should be resorted to only when, . . ., defendant would otherwise be denied a fair trial." At p. 36. And, as pointed out in *State v. Haffa,* 246 Iowa 1275, 1283, 71 N. W. 2d 35, 40 (1955), cert. denied 350 U. S. 914, 76 S. Ct. 198, 100 L. Ed. 801, a fair trial does not necessarily mean an absolutely perfect trial.

CONCLUSION

The Petitioner has presented no showing on any of the foregoing questions dealing with the merits that indicates he had anything but a fair trial.

In addition he fails to show jurisdiction to grant his Petition for Writ of Certiorari by showing on any issue that a federal question was specifically raised in the trial court and preserved in the Iowa Supreme Court; that it might have been so raised and preserved is not sufficient. *Tacon v. Arizona,* 410 U. S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U. S. 437, 438 (1969).

Petitioner seeks to review evidence and discuss specific facts and certiorari is not granted for such purposes. *Garner v. Louisiana,* 368 U. S. 157, 166 (1961); *United States v. Johnston,* 268 U. S. 220, 227 (1925).

For the foregoing reasons the Petition for Writ of Certiorari filed by this Petitioner should be denied.

Respectfully submitted

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Iowa Assistant Attorney General

Attorneys for Respondent.

APPENDIX

In The District Court of Iowa in and For Johnson County

No. 6115

PROCEEDINGS PURSUANT TO REMAND

STATE OF IOWA,

vs.

JAMES WENDELL HALL,
Defendant

Johnson County Courthouse
Iowa City, Iowa
January 9, 1976

Before:

Hon. Louis W. Schultz, Judge

Appearances:

Johnson County Attorney
Jack Dooley, Iowa City,
Iowa; Assistant Attorneys
General Garry Woodward
and William Enke,

for the State.

William M. Tucker, Esq.,
and Bruce Walker, Esq.,
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Iowa,

for the defendant.

TRANSCRIPT OF SHORTHAND NOTES

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* * *

Mr. Walker: There is no reflection concerning this time variance we have now discovered. I recall talking with her in excess of a half hour. I can't recall specifically whether Mr. Tucker was present or not, but I do recall meeting with her on at least one occasion or more and spoke with her on the telephone one or two times. I'm afraid I—I do have notes and could review them, but I can't be any more specific.

Mr. Tucker: The time records will show every witness we spoke to. Our time records will show what day he spoke with her.

The Court: Why didn't the State call Elizabeth Allen?

Mr. Woodward: First of all I would like to call to the Court's attention that it seems everyone takes it for granted that this transcript of the grand jury was everything that occurred before the grand jury, and I would point out first of all that the girl who was transcribing for the grand jury, I think it was probably the first time she had worked with a grand jury. Quite frankly, I have had many grand juries but I think up to that time I had never used a court reporter, I had generally used a regular stenographer and dictated to the stenographer. Sometimes we got off the record for a long while because we didn't think about it; other times we cut things off the record because it descended into opinions and sometimes just clarifying things with witnesses, and then we didn't get back on the record. So to say this is a complete record, it isn't. I want to make that clear. There has already been the argument that John Jutte wasn't sworn in. Well, he was sworn in, although it may not show it in the record, the first time he appeared before the grand jury, and he was re-

minded every time he appeared. Now as to Elizabeth Allen specifically, she appeared before the grand jury and she was asked about the—what happened when this telephone call came in. I am not even sure she was present in the room as to the first phone call. She was there in the afternoon and went away and came back. They refer to two phone calls, so I don't think she was present when the first phone call came in, but she said at the time the phone call came in Mr. Roberson went around the room looking for a key to the front door, and there was quite a delay in him hunting for the key, and then it suddenly occurred to me that what do you need a key for, doesn't it have a push bar down there, and she said, "Oh, yes, it does." Then she said, "I guess he was giving me some instructions on typing." So finally I dictated the minutes after her testimony showing a delay taking place of her saying there was a delay of typing before Roberson left the room, and I have a copy of the testimony before the grand jury, and in the dictated minutes it shows "that she remembers one phone call that Roberson received and he directed her how to type a page, then left immediately, being out of the room approximately 15, 20 minutes." That is what she signed at that time. The minutes show that there was a delay, showing that there was—that he was instructing her regarding typing. I considered her a dingaling because her first reason she gave was the fact that he was looking for a key to get in the front door. On that basis we never used her as a witness. We felt that Mr. Roberson, who stood up to our questioning on and off the record, very careful questioning, that he remembered accurately, and we used him as a witness. These minutes of testimony were available from the very beginning to defense counsel and in no way can be considered exculpatory.

• • •

A. No.

Q. And the final name listed is Rory Kuhn. Does that name mean anything to you?

A. No.

Q. Were all of the names brought up by the grand jury in this proceedings relevant to this case?

Mr. Tucker: That is objected to as self-serving.

The Court: Overruled. You may answer.

Mr. Goetz: Would you repeat the question again?

(The reporter read the question.)

A. No, they weren't. I mean this case was surrounded by a tremendous amount of rumor and hearsay and gossip in the community. It was evidenced in the newspapers and statements made by the various participants in the proceedings to the press and public, and to their friends, and of course this type of information was available to the grand jury, since they are members of the community, and they might ask us, "Have you heard about this, or have you investigated this?" and this sort of thing, and this is how these names might have come up.

Q. Did they also sometimes come up in other connections quite aside from the case?

A. Well, they may have, the grand juror may have a child and that child know somebody acquainted with somebody, something like that, and a name might come up that way.

Q. Was one of the members of the grand jury connected with a real estate or insurance business?

A. There was a man in the insurance business there, if I remember correctly. I can't recall his name on the tip of my tongue.

Mr. Tucker: Ziskosky.

Mr. Goetz: Ziskosky, that's right.

Q. Was there a man by the name of Mr. Grady?

A. Yes. He knew a lot about all the rumors in the case.

Q. Do you know whether or not they sometimes just asked questions, "Well, do you know so-and-so?" just on a curiosity basis having nothing to do with the case?

A. Sure. This was a very uninhibited grand jury, we weren't leading them through this investigation whatever, they were doing a lot of investigating on their own.

Q. Mr. Goetz, did you have occasion to go to the City of Des Moines in connection with this case prior to the trial thereof?

A. Yes, I did.

Q. And where did you go?

A. We went to the BCI laboratory.

Q. Who was present at that time?

A. I met Mr. Tucker there. Mr. Tucker, if I remember correctly, came to Des Moines.

Q. And what did you do there?

A. I was present when Mr. Tucker examined the body of evidence that was in the possession of the BCI.

Q. Did the BCI give full cooperation at that time?

A. Yes, I guess they did.

Q. Do you know of anything that was withheld from the defense attorneys at that time that was in the body of evidence?

A. No.